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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1010

WILLIAM BENJAMIN CRAIG,

Petitioner,

—v.—

FLORIDA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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WILLIAM BENJAMIN CRAIG,

Petitioner,

—v.—

FLORIDA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida entered in the above-entitled case on October 13, 1965.

Opinion Below

The opinion of the Supreme Court of Florida and the dissenting opinion of Judge Ervin are reported at 179 So.2d 202. They are set forth in the Appendix, pp. 1a-16a.

Jurisdiction

The judgment of the Supreme Court of Florida was entered October 13, 1965. The time for filing this petition for writ of certiorari was extended by Mr. Justice Fortas to and including February 11, 1965. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

Questions Presented

1. Petitioner, a Negro, has been sentenced to death for the rape of a white woman. He has shown that in the past twenty-five years only one white man has been executed for rape, and that for the rape of a white child under aggravated circumstances. On the other hand, twenty-nine Negroes have been executed, all for the rape of white adult women. No white or Negro male has ever been executed for the rape of a Negro, child or adult. In contrast, the number of Negroes convicted for rape is only slightly higher than the number of whites. Under these circumstances, has petitioner made sufficient showing of a denial of the equal protection of the laws in violation of the Fourteenth Amendment to require the State to come forward with some evidence that the disproportion of Negroes executed for rape is not accounted for by race?

2. Does the imposition of the death penalty for the offense of rape by the State of Florida on the basis of the jury's unfettered, unreviewable discretion constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?

3. Does the assigning to the jury in a capital rape case under Florida law the function of deciding simultaneously both the guilt of the defendant and the penalty to be inflicted constitute a denial of due process of law in violation of the Fourteenth Amendment?

Constitutional and Statutory Provisions Involved

This case involves the Eighth Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States.

This case also involves the following statute of the State of Florida:

> Section 794.01—Rape and forcible carnal knowledge; penalty.
>
> Whoever ravishes and carnally knows a female of the age of ten years or more, by force and against her will, or unlawfully or carnally knows and abuses a female child under the age of ten years, shall be punished by death, unless a majority of the jury in their verdict recommend mercy, in which event punishment shall be by imprisonment in the state prison for life, or for any term of years within the discretion of the judge. It shall not be necessary to prove the actual emission of seed, but the crime shall be deemed complete upon proof of penetration only.

Statement

Petitioner William Benjamin Craig was indicted on June 6, 1963, by the Grand Jury of Leon County, Florida for the crime of rape upon a female person over the age of ten years. Petitioner Craig is a Negro and the victim is an adult white female. He was tried before a jury in the Circuit Court of the Second Judicial Circuit in and for Leon County. Under provisions of Florida law, the same jury considered simultaneously the questions of the guilt of petitioner and the sentence to be imposed. The jury returned a verdict of guilty without a recommendation of mercy on June 20, 1963 (R., p. 6).

On June 27, 1963, a judgment and sentence of death was entered by the Court. An appeal was taken from the verdict and sentence, they were affirmed October 21, 1964, by the Supreme Court of Florida (*Craig* v. *State,* 168 So.2d

747; R., pp. 32-34), and an order denying a petition for rehearing was entered December 7, 1964.

On February 10, 1965 petitioner filed a motion for reduction of sentence from death to life imprisonment or less in the Circuit Court of Leon County. The bases for the motion were that:

(1) Imposition of the death penalty on petitioner denied him the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States because the death penalty had been used as an instrument of racial discrimination against Negroes convicted of the rape of white women.

(2) The procedure under Florida law which allows the jury which determines the guilt of a person accused of rape also to determine simultaneously the punishment to be imposed violated the due process clause of the Fourteenth Amendment.

(3) The imposition of the death sentence for rape subjected the petitioner to cruel and unusual punishment and violated due process of law in violation of the Eighth and Fourteenth Amendments to the Constitution. (See Record, pp. 8-10.)

In support of this motion the petitioner introduced statistical data regarding the imposition of the death penalty for rape. The State did not object to or contradict the data and it was accepted as accurate by the trial court in deciding the motion for reduction of sentence (R., p. 26).[1] The motion for reduction of sentence was

[1] The Court said:

The Defendant offered to prove up the statistics therein contained with the respective files of each of the 285 convictions from the several Florida counties involved should this Court feel such proof

denied in the trial court on February 17, 1965 (R., p. 26). An appeal was taken to the Supreme Court of Florida, and on October 13, 1965, the decision of the trial court was affirmed by the Supreme Court of Florida (179 So.2d 202). (Appendix, pp. 1a-3a.) Judge Ervin dissented on the ground that by permitting the same jury to decide both the guilt and punishment of the petitioner the State had denied due process of law in violation of the Fourteenth Amendment to the United States Constitution (179 So.2d at 204-210). (Appendix, pp. 3a-16a.)

Capital Punishment for Rape

In his motion for reduction of sentence, petitioner maintained that Section 794.01 of the Florida statutes, which imposes the death sentence for the crime of rape, was unconstitutional as applied to him. In support of this contention, statistics were introduced which revealed the pattern of discrimination against Negroes in the imposition of the death sentence.[2] The statistics, which were ac-

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desirable or necessary in addition to the verification of the memorandum brief by counsel. This Court does not feel that such proof is required, desirable or necessary, and for the purposes of this motion accepts the statistics contained in the memorandum as substantially correct. The State of Florida voiced no objection to this procedure (R., p. 26).

[2] This footnote sets out in tabular form the statistics discussed in the text *infra*:

TABLE A

RAPE CONVICTIONS 1940-1964

TOTAL:	DEFENDANT			VICTIM	
	(Negro)	(White)	(Indian)	(Negro)	(White)
285[a]	152			68[b]	84[c]
		132		7	125[d]
			1	0	1

(footnote 2 continued on next page)

cepted as accurate by the trial court, may be summarized as follows:

During the 25-year period between January 1, 1940 to December 31, 1964, there have been a total of 285 convictions for the crime of rape for which information concerning the race of the victims and the defendants is available.[2] (R., p. 18) One hundred and thirty-two white men, or 46% of the total, have been convicted for the rape of 125 white and 7 Negro women (*Ibid.*). One hundred and fifty-two Negro men, or 54% of the total, have been convicted for the rape of 84 white and 68 Negro women (*Ibid.*). The remaining conviction was that of an Indian who raped

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[2] *(continued)* TABLE B

DISPOSITION OF 54 RAPE DEFENDANTS SENTENCED TO DEATH, BY RACE OF DEFENDANT AND RACE OF VICTIM—1940-1964

		Defendant		Victim	
		Negro	White	Negro	White
30	Electrocutions	29		0	29
			1		1[e]
5	Commutations	2		0	2
			3	0	3[e]
12	Awaiting Execution	12		2[e]	10
1	Killed	1		0	1
6	Death Judgment Reversed	4		1	3
			2	0	2
Totals 54		48	6	3	51

a—Excluding 13 cases from Brevard and Hillsborough Counties because race information is unavailable.

b—Includes 26 children under 14.

c—Includes 3 children under 14.

d—Includes 34 children under 14.

e—Children under 14.

(R., pp. 21-22)

[3] There were 13 other cases in two counties for which no information as to race was available (R., p. 18).

a white woman. Fifty-four men have been sentenced to death for rape; 48 Negroes and six whites (R., p. 14).

There have been 125 cases of white females being raped by white men; 34 of the victims were children under 14 (R., p. 19). Six white men have been sentenced to death for these offenses but only one has been electrocuted (R., p. 19). The single white man actually electrocuted, Robert Wesley Davis, was convicted of raping an eleven-year old white child under extraordinarily aggravated circumstances (see, *Davis* v. *State,* 123 So.2d 703 (Fla., 1960)).

Of the other five whites originally condemned to die, three raped white children ranging in age from 9 to 13, and in all three cases the State Pardon Board commuted their sentence to life imprisonment (R., p. 15). The final two were co-defendants convicted of raping a single white adult (R., p. 15). The jury verdicts finding them guilty without recommendation of mercy were reversed by the Supreme Court of Florida which found that the judgment of death had been the result of prejudicial comments made by the trial judge. *Raulerson* v. *State,* 102 So.2d 281 (1958). No white man has been electrocuted for the rape of a white adult or even sentenced to death for the rape of a Negro adult or child.

The remaining 48 men who received sentences of death were all Negroes (R., p. 16). Of these, 29 have already been electrocuted, and 12 others are presently awaiting execution on death row at the Florida State Prison (R., pp. 16-17). The death sentences of four other Negroes were reversed by the Supreme Court of Florida (R., p. 17) (*Harris* v. *State,* 162 So.2d 262 (1964); *Bell* v. *State,* 93 So.2d 575 (1957); *Truluck* v. *State,* 108 So.2d 748 (1959)); they thereafter received lesser sentences. A sheriff killed one Negro en route to a new trial after his conviction was

reversed by *Shepherd* v. *Florida*, 341 U.S. 50. The Pardon Board commuted the death sentences of the remaining two Negroes who were given the death penalty for rape (R., p. 17).

Of 84 convictions of Negro men for the rape of white women, 45 resulted in sentences of death (53%) (R., p. 19). Only one of these cases involved the rape of a white child. Thus, 44 Negro defendants have been sentenced to death for the rape of white adult women; 29 of them have been executed and ten await execution *(Ibid.)*.

On the other hand, in the 68 cases in which Negro males have been convicted of raping Negro women (26 cases involving children under 14), only three have been sentenced to death. All three of these convictions were for attacks on children; two defendants are presently awaiting execution *(Ibid.)*. The third conviction was reversed by the Supreme Court of Florida. (*Bell* v. *State*, 93 So.2d 575 (1957).) Therefore, to date no Negro has been electrocuted for the rape of another Negro adult or child.

Statistics introduced with regard to the actions of the Florida State Board of Pardons also show a disparity in the treatment of white and Negro defendants. The Board has heard 38 appeals for clemency from convicted rapists out of the 54 death sentences for rape, and commuted three of the four white death sentences. On the other hand, it denied relief to 32 of the 34 Negro applicants (R., p. 20).

These results contrast sharply with treatment afforded those convicted of murder. Since January 1, 1924, the Pardon Board heard pleas from 216 convicted murderers, of which 129 were Negroes and 85 white, and two of unknown race. Thirty-three, or 25.6%, of the Negroes and 21, or 24.7%, of the whites secured commutation of sen-

tence (R., p. 20). In other words, for murder, no racial factor seems to operate in deciding clemency applications.

To summarize, between January 1, 1940 and December 31, 1964, fifty-four men were sentenced to death in Florida following convictions for the crime of rape. Six of the 54 men who received the death sentence were white, the balance, 48, were Negroes. However, only one white was actually executed (for the aggravated rape of a white child), while 29 Negroes have been electrocuted, (all of whom were convicted of raping white adult women) and twelve others (ten of whom raped white women) are presently awaiting execution.

These statements of fact are not disputed. No inference other than one of racial discrimination in application of the death penalty has been offered.

How the Federal Questions Were Raised and Decided Below

After the affirmance of his conviction and sentence by the Supreme Court of Florida on June 27, 1963, petitioner filed a motion for reduction of sentence from death to a term of years in the Circuit Court of Leon County (R., pp. 8-10). The ground for the motion was that the sentence of death was a denial of the equal protection of the laws and of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. Therefore, Sec. 794.01, Fla. Stat. Ann., was unconstitutional on its face and as applied to him. The motion was denied, and petitioner appealed to the Supreme Court of Florida. That court accepted jurisdiction, considering the motion as a collateral, post-conviction assault on a judgment of conviction within the scope of the Florida Criminal Procedure Rule No. 1, Fla. Stat. Ann., Chapter 924, Ap-

pendix. The denial of the motion by the lower court, upholding the statute as valid under the federal Constitution, was affirmed on the merits. (179 So.2d at 204.)

Reasons for Granting the Writ

I.

Certiorari Should Be Granted to Determine Whether the Application to Petitioner of Florida's Death Penalty for Rape Is Unconstitutional Because an Unrebutted Prima Facie Showing Has Been Made of Its Racial Application in Violation of the Equal Protection Clause of the Fourteenth Amendment.

Seventeen American States retain capital punishment for rape. Nevada permits imposition of the penalty only if the offense is committed with extreme violence and great bodily injury to the victim;[4] the remaining sixteen jurisdictions—which allow their juries absolute discretion to punish any rape with death—are all southern or border states.[5] The federal jurisdiction and the District of Colum-

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[4] Nev. Rev. Stat. §200.360 (1963). See also §200.400 (aggravated assault with intent to rape).

[5] The following sections punish rape or carnal knowledge unless otherwise specified. Ala. Code §§14-395, 14-397, 14-398 (Recomp. Vol. 1958); Ark. Stat. Ann. §§41-3403, 43-2153 (1964 Repl. Vols.); see also §41-3405 (administering potion with intent to rape); §41-3411 (forcing marriage); Fla. Stat. Ann. §794.01 (1964 Cum. Supp.); Ga. Code Ann. §§26-1302, 26-1304 (1963 Cum. Supp.); Ky. Rev. Stat. Ann. §435.090 (1963); La. Rev. Stat. Ann. §14:42 (1950) (called aggravated rape but slight force is sufficient to constitute offense; also includes carnal knowledge); Md. Ann. Code, art. 27, §§461, 462 (1957); see also art. 27, §12 (assault with intent to rape); Miss. Code Ann. §2358 (recomp. Vol. 1956); Vernon's Mo. Stat. Ann. §559.260 (1953); N.C. Gen. Stat. §14-21 (Recomp. Vol. 1953); Okla. Stat. Ann., tit. 21, §§1111, 1114, 1115 (1958); S.C. Code Ann. §§16-72, 16-80 (1962) (includes assault with attempt to rape as well as rape and carnal knowledge); Tenn. Code Ann. §§39-3702, 39-3703,

bia, with its own strong southern traditions, also allow the death penalty for rape.[6]

Between 1930 and 1962, two years before petitioner was sentenced to die, 446 persons were executed for rape in the United States. Of these, 399 were Negroes, 45 were whites, and 2 were Indians. All were executed in southern or border States or the District. The percentages—89.5% Negro, 10.1% white—are revealing when compared to similar racial percentages of persons executed during the same years for murder and other capital offenses. Of the total number of persons executed in the United States, 1930-1962, for murder, 49.1% were Negro; 49.7% were white. For other capital offenses, 45.6% were Negro; 54.4% were white. Louisiana, Mississippi, Oklahoma, Virginia, West Virginia and the District of Columbia never executed a white man for rape during these years. Together they executed 66 Negroes. Arkansas, Delaware, Florida, Kentucky and Missouri each executed one white man for rape between 1930 and 1962. Together they executed 71 Negroes. Putting aside Texas (which executed 13 whites and 66 Negroes), sixteen Southern and border States and the District of Columbia between 1930 and 1962 executed 30 whites and 333 Negroes for rape: a ratio of better than one to eleven. Clearly, unless the incidence of rape by Negroes is many times that of rape by whites, capital punishment for rape survives in the twentieth century principally as an instrument of racial discrimination.[7]

39-3704, 39-3705 (1955); Tex. Pen. Code Ann., arts. 1183, 1189 (1961); Va. Code Ann. §18.1-44 (Repl. Vol. 1960); see also §18.1-16 (attempted rape).

[6] 18 U.S.C. §2031 (1964); 10 U.S.C. §920 (1964); D.C. Code Ann. §§22-2801 (1961).

[7] The figures in this paragraph are taken from UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, No. 32; *Executions, 1962* (April 1963). Table 1 thereof shows the follow-

If this be so—if the racially unequal results in these States derive from any cause which takes account of race

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ing executions under civil authority in the United States between 1930 and 1962:

MURDER

	Total	White	Negro	Other
Number	3298	1640	1619	39
Per Cent	100.0	49.7	49.1	1.2

RAPE

	Total	White	Negro	Other
Number	446	45	399	2
Per Cent	100.0	10.1	89.5	.04

OTHER OFFENSES

	Total	White	Negro	Other
Number	68	37	31	0
Per Cent	100.0	54.4	45.6	0.0

Table 2 thereof shows the following executions under civil authority in the United States between 1930 and 1962, for the offense of rape, by State:

	White	Negro	Other
Federal	2	0	0
Alabama	2	20	0
Arkansas	1	17	0
Delaware	1	3	0
District of Columbia	0	2	0
Florida	1	35	0
Georgia	3	58	0
Kentucky	1	9	0
Louisiana	0	17	0
Maryland	6	18	0
Mississippi	0	21	0
Missouri	1	7	0
North Carolina	4	41	2
Oklahoma	0	4	0
South Carolina	5	37	0
Tennessee	5	22	0
Texas	13	66	0
Virginia	0	21	0
West Virginia	0	1	0
	45	399	2

as a factor in meting out punishment—a Negro punished by death is denied, in the most radical sense, the equal protection of the laws.[8] One of the cardinal purposes of the Fourteenth Amendment was the elimination of racially discriminatory criminal sentencing. The First Civil Rights Act of April 9, 1866, ch. 31, §1, 14 Stat. 27, declared the Negroes citizens of the United States and guaranteed that "such citizens, of every race and color, . . . shall be subject to like punishment, pains, and penalties [as white citizens], and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." The Fourteenth Amendment was designed to elevate the Civil Rights Act of 1866 to constitutional stature. See, e.g., *tenBroek, Thirteenth Amendment to the Constitution of the United States,* 39 CALIF. L. REV. 171 (1951); *Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights,* 2 STAN. L. REV. 5 (1949). The Enforcement Act of May 31, 1870, ch. 114, §§16, 18, 16 Stat. 140, 144, implemented the Amendment by re-enacting the 1866 act and extending its protection to all persons. This explicit statutory prohibition of racially discriminatory sentencing survives today as REV. STAT. §1977 (1875), 42 U.S.C. §1981 (1964).

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[8] The contention that racially discriminatory application of the death penalty in rape cases denies equal protection has been raised in a number of cases now pending in state and federal courts. See, e.g., *Mitchell* v. *Stephens,* 232 F. Supp. 497, 507 (E.D. Ark. 1964), appeal pending; *Moorer* v. *MacDougall,* U.S. Dist. Ct., E.D.S.C., No. AC-1583, appeal pending; *Aaron* v. *Holman,* U.S. Dist. Ct., M.D. Ala., C.A. No. 2170-N, proceedings on petition for writ of habeas corpus stayed pending exhaustion of state remedies July 2, 1965; *Swain* v. *Alabama,* Ala. Sup. Ct., 7 Div. No. 699, petition for leave to file petition for writ of error coram nobis denied June 25, 1965, cert. denied, —— U.S. ——, 15 L.ed.2d 353; *Maxwell* v. *Stephens,* 348 F.2d 325 (8th Cir. 1965), cert. denied, —— U.S. ——, 15 L.ed.2d 353; *Alabama* v. *Billingsley,* Cir. Ct. Etowah County, No. 1159, motion for new trial and motion for reduction of sentence pending; *Sims* v. *Georgia,* 144 S.E.2d 103, petition for cert. pending, Misc. 918; *Louisiana ex rel. Scott* v. *Hanchey,* 20th Jud. Dist. Ct., Parish of West Feliciana, petition for habeas corpus pending.

For purposes of the prohibition, it is of course immaterial whether a State writes on the face of its statute books: "Rape shall be punishable by imprisonment . . ., except that rape by a Negro of a white woman, or any other aggravated and atrocious rape, shall be punishable by death by electrocution," or whether the State's juries read a facially color-blind statute to draw the same racial line. Discriminatory application of a statute fair upon its face is more difficult to prove, but no less violates the State's obligation to afford all persons within its jurisdiction the equal protection of the laws. See, e.g., *Yick Wo* v. *Hopkins,* 118 U.S. 356; *Niemotko* v. *Maryland,* 340 U.S. 268 (alternate ground); *Fowler* v. *Rhode Island,* 345 U.S. 67; *Hamilton* v. *Alabama,* 376 U.S. 650 (per curiam). And it does not matter that the discrimination is worked by a number of separate juries functioning independently of each other rather than by a single state official. However it may divide responsibility internally, the State is federally obligated to assure the equal application of its laws. This Court has long sustained claims of discriminatory jury exclusion upon a showing of exclusion continuing during an extended period of years, without inquiry whether the same jury commissioners served throughout the period. E.g., *Neal* v. *Delaware,* 103 U.S. 370; *Bush* v. *Kentucky,* 107 U.S. 110; *Hernandez* v. *Texas,* 347 U.S. 475. Congress, when it enacted the 1866 Civil Rights Act knowing that "In some communities in the South a custom prevails by which different punishment is inflicted upon the blacks from that meted out to whites for the same offense," [9] intended precisely by the Act, and subsequently by the Fourteenth Amendment, to disallow such "custom" as it operated through the sentences imposed by particular judges and juries.

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[9] Cong. Globe, 39th Cong., 1st Sess. 1758 (4/4/1866) (remarks of Senator Trumbull, who introduced, reported and managed the bill which became the act.) See also, *Id.,* at 475 (1/29/1866) and 1759 (4/4/1866).

The petitioner asks this court to consider whether he has not made a showing of racially discriminatory capital sentencing under Florida's rape statute sufficient to throw some burden of explanation on the state. Because of the Fourteenth Amendment's overriding purpose to secure racial equality, "racial classifications [are] 'constitutionally suspect,' . . . and subject to the 'most rigid scrutiny'." *McLaughlin* v. *Florida*, 379 U.S. 184, 192. This principle has as its corollary that a sufficient initial showing of unequal treatment of the races is made whenever it appears that the races are substantially disproportionately represented in groups of persons differently disposed of under those procedures: such a showing compels the inference that a State is drawing the racial line unless the State offers some justification in non-racial factors for the disproportion. See, e.g., *Norris* v. *Alabama*, 294 U.S. 587; *Hernandez* v. *Texas*, 347 U.S. 475; *Gomillion* v. *Lightfoot*, 364 U.S. 339; cf. *Oyama* v. *California*, 332 U.S. 633.

Here the demonstrated disproportion is extreme. Over a twenty-five year period, between January 1, 1940 and December 31, 1964, 48 of the men sentenced to die for rape were Negroes and only 6 were white—a ratio of eight to one. The evidence also shows that this disparity cannot be accounted for by a greater number of Negroes being convicted for rape, since in the same period 152 Negroes, 132 Whites, and 1 Indian were so convicted.

The Florida statistics take on added significance when the race of the rape victim is considered. In the twenty-five year period only one white man was actually executed and that was for the rape of an eleven year old white child under extremely aggravated circumstances. Of the five other whites sentenced to death (but whose sentences were either reversed or commuted) three had raped white chil-

dren ranging in age from nine to five, and the other two had raped a single white adult.

All twenty-nine of the Negroes who have been executed, and ten of the twelve presently awaiting execution, were convicted of raping white women. (The other seven Negroes sentenced to die have had their sentences of death reversed by a higher court, or have had their death sentences commuted by the Pardon Board.) A total of forty-four of the forty-eight Negro defendants have been sentenced to death or electrocuted for the rape of white adult women. No Negro or white, to date, has been electrocuted for the rape of a Negro adult or child. Three other Negroes have been sentenced to death for raping Negro children, with one having his conviction reversed by the Supreme Court of Florida. (See *Statement, supra.*)

This is at least sufficient evidence to make an initial showing of racial discrimination and to transfer the burden of explanation to the State. While determination of the relative influence of the racial factor, as opposed to factors arising from the circumstances of the individual cases, would be aided by data detailing the facts of each prosecution for rape, the burden should be on the state to demonstrate the countervailing influence of such factors since it should have the responsibility of rebutting the inference raised by the above statistics, and since if such a showing can be made, the state has the resources available to do so.

The trial court, and the Supreme Court of Florida, although accepting the correctness of petitioner's statistical showing, held that the Florida statute was constitutional both on its face and as applied to petitioner without discussion. No attempt was made by the state at any part of the proceeding to explain or justify the discrepancy in the application of the death penalty clearly demonstrated by the statistics summarized above.

This Court should hold that the State may not thus remain silent in the face of such a record. Several considerations support the holding.

First, the hypothesis of racial discrimination is particularly likely in view of the coincidence between the Florida figures and those of the other jurisdictions—all southern—which have executed persons for rape during the past thirty years. For all jurisdictions, the Negro-white ratio is nine to one—although for other crimes than rape it is about one to one. Studies and observations by students of the criminal process tend to support the hypothesis of discrimination. *E.g., Bullock, Significance of the Racial Factor in the Length of Prison Sentences,* 52 J. CRIM. L., CRIM. & POL. SCI. 411 (1961); *Wolfgang, Kelly & Nolde, Comparison of the Executed and the Commuted among Admissions to Death Row,* 53 J. CRIM. L., CRIM. & POL. SCI. 301 (1962); *Hartung, Trends in the Use of Capital Punishment,* 284 ANNALS 8, 14-17 (1952); WEIHOFEN, THE URGE TO PUNISH 164-165 (1956).

Second, put in the context of the broader picture of Florida life and law, the inference that these death penalties were racially motivated becomes overwhelming. Florida still by statute forbids the intermarriage of whites with Negroes, (Fla. Const., Art. 16, §24; Fla. Stat. Ann. §§741.11-741-16), and only recently was its statute prohibiting interracial cohabitation struck down by this Court. *McLaughlin* v. *Florida,* 379 U.S. 184. (Fla. Stat. Ann. §798.05. See also, §798.04.) The lesson the State thus officially teaches its citizens respecting the abhorrence in which even voluntary interracial sexual relations should be held cannot help but have an impact on the views which a criminal jury will hold of an interracial rape. Cf. *Peterson* v. *City of Greenville,* 373 U.S. 244; *Lombard* v. *Louisiana,* 373 U.S. 267; *Robinson* v. *Florida,* 378 U.S. 153.

Finally, in this context, the absolute discretion which Florida law gives jurors to decide between life and death, undirected by any rational standards for making that decision (see part II *infra*), invites the influence of arbitrary and discriminatory considerations. This Court has long been concerned with a vagueness of criminal statutes which "licenses the jury to create its own standard in each case." *Herndon* v. *Lowry*, 301 U.S. 242, 263. See, e.g., *Smith* v. *Cahoon*, 283 U.S. 553; *Cline* v. *Frink Dairy Co.*, 274 U.S. 445; *Connally* v. *General Construction Co.*, 269 U.S. 385; *Winters* v. *New York*, 333 U.S. 507. The vice of such statutes is not alone their failure to give fair warning of prohibited conduct, but the breadth of room they leave for jury caprice and suasion by impermissible considerations, *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 432-433; *Freedman* v. *Maryland*, 380 U.S. 51, 56; *Lewis, The Sit-In Cases: Great Expectations*, [1963] SUPREME COURT REVIEW 101, 110; Note, 109 U.Pa.L.Rev. 67, 90 (1960), including racial considerations, see *Louisiana* v. *United States*, 380 U.S. 145; *Dombrowski* v. *Pfister*, 380 U.S. 479; *Cox* v. *Louisiana*, 379 U.S. 536. Unlimited sentencing discretion in a capital jury presents this vice in the extreme. To paraphrase *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 505: "Under such a standard the most careful and tolerant [lay juror] . . . would find it virtually impossible to avoid favoring one [race] . . . over another."

Petitioner requests the Court to grant certiorari to review and reverse the judgment of the Supreme Court of Florida, which left the sentence of death standing after petitioner had made an unrebutted prima facie showing that he had been denied equal treatment in the most grievous penalty known to law.

II.

The Court Should Grant Certiorari to Consider Petitioner's Contention That His Sentence Is Unconstitutional Under the Eighth and Fourteenth Amendments.

Petitioner alleged that he was unconstitutionally sentenced without consideration of aggravating or mitigating circumstances, pursuant to §794.01 of the Florida Statutes Annotated, which statute on its face and as applied prescribes the imposition of cruel and unusual punishment in violation of the Fourteenth Amendment. This question, which three Justices of the Court thought deserving of certiorari in *Rudolph* v. *Alabama,* 375 U.S. 889, has been deemed by both the Fourth and Eighth circuits as one which "must be for the Supreme Court in the first instance." *Maxwell* v. *Stephens,* 348 F.2d 325, 332 (8th Cir. 1965) cert. denied, ... U.S. ....., 15 L.Ed. 2d 353. The Fourth Circuit has taken the same view. *Ralph* v. *Pepersack,* 335 F.2d 128, 141 (4th Cir. 1964), cert. denied, 380 U.S. 925. Petitioner respectfully requests the judgment of the Court on the issue.

The question posed is not whether on any rational view which one might take of the purpose of criminal punishment, the defendant's conduct as the jury might have found it at its worst on this record could support a death sentence consistent with civilized standards for the administration of criminal law. As the issue of penalty was submitted to the jury in their unlimited discretion under Florida procedure, their attention was directed to none of the purposes of criminal punishment, nor to any aspect or aspects of the defendant's conduct. They were not invited to consider the extent of physical harm to the prose-

cutrix, the moral heinousness of the defendant's acts, his susceptibility or lack of susceptibility to reformation, the extent of the deterrent effect of killing the defendant *"pour decourager les autres."* Cf. *Packer, Making the Punishment Fit the Crime,* 77 Harv. L. Rev. 1071 (1964).

The absence of these or any other standards to guide a Florida jury in determining whether a defendant should live or die render the procedure violative of due process under the rationale of *Giacco* v. *Pennsylvania,* —— U.S. ——, 34 U.S.L.W. 4099. There this Court struck down the Pennsylvania statute allowing a jury to assess the costs of a criminal proceeding on an acquitted defendant, because of an absence of any standards on which the jury could rationally base its decision. The Court said:

> Certainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce. 34 U.S.L.W. 4100.[10]

Under the Florida procedure the jurors were permitted to choose between life and death upon conviction for any reason, rational or irrational, or for no reason at all: at a whim, a vague caprice or because of the color of petitioner's skin if that did not please them. In making the determination to impose the death sentence, they acted

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[10] Petitioner recognizes that the Court disclaimed any implications as to the validity of established sentencing procedures. However, he submits that the combination of the evident intrusion of race as a factor in the decision, the imposition of the extreme penalty, and the simultaneous decision as to verdict and sentence (see Part III, *infra*) involved here make the rational of *Giacco* particularly applicable.

wilfully and unreviewably, without standards and without direction. Nothing assured that there would be the slightest thread of connection between the sentence they exacted and any reasonable justification for exacting it. Cf. *Skinner* v. *Oklahoma,* 316 U.S. 535. A judgment so unconfined, so essentially erratic, is *per se* cruel and unusual because it is purposeless, lacking in any relationship by which its fitness to the offense, or to the offender or to any legitimate social purpose may be tested. It is cruel not only because it is extreme but because it is wanton; and unusual not only because it is rare, but because the decision to remove the defendant from the ordinary penological regime is arbitrary. To concede the complexity and interrelation of sentencing goals, see *Packer, supra,* is no reason to sustain a statute which ignores them all. It is futile to put forward justifications for a death so inflicted; there is no assurance that the infliction responds to the justification or will conform to it in operation. Inevitably under such a sentencing regime, capital punishment in those few, arbitrarily selected cases where it is applied both is " 'disproportioned to the offenses charged' " and constitutes " 'unnecessary cruelty.' " *Rudolph* v. *Alabama, supra,* 375 U.S. at 891.[11]

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[11] The United States Department of Justice has taken the following position on continued imposition of the death penalty: "We favor the abolition of the death penalty. Modern penology with its correctional and rehabilitation skills affords greater protection to society than the death penalty which is inconsistent with its goals. This Nation is too great in its resources and too good in its purposes to engage in the light of present understanding in the deliberate taking of human life as either a punishment or a deterrent to domestic crime." Letter of Deputy Attorney General Ramsey Clark to the Honorable John L. McMillan, Chairman, District of Columbia Committee, House of Representatives, July 23, 1965, reported in New York Times, July 24, 1965, p. 1, col. 5.

III.

The Court Should Grant Certiorari to Decide Whether Florida's Single Verdict Procedure Allowing the Jury Which Determines Guilt Simultaneously to Fix Capital Punishment for Rape Violates the Due Process Clause of the Fourteenth Amendment.

Under the procedure here employed by the State of Florida, the jury which found petitioner guilty of rape was required simultaneously to determine by its vote whether he should be electrocuted or suffer imprisonment. Section 794.01, Florida Statutes, provides:

> Whoever ravishes and carnally knows a female of the age of ten years or more . . . shall be punished by death, unless a majority of the jury in their verdict recommend mercy, in which event punishment shall be by imprisonment in the state prison for life, or for any term of years within the discretion of the judge. . . .

The Florida courts read this statute as requiring a single verdict: a jury which finds guilt determines sentence without receiving further evidence or instruction, indeed, without even returning to the courtroom.

This procedure thrust upon petitioner, at the outset of the trial, an intolerable choice: On the one hand, he could decide not to testify, relying on his privilege under the Fifth and Fourteenth Amendments. *Malloy* v. *Hogan,* 378 U.S. 1. But were he convicted, the jury would determine his sentence with no knowledge whatsoever of his background or personality or of any mitigating circumstances; the jury would know none of the information which settled views of penology consider indispensable to a rational sen-

tencing decision. See *Williams* v. *New York,* 337 U.S. 241, 247-8. Indeed, the full consideration of the circumstances of a crime may be necessary for "the exercise of a sound discretion" as required by due process. See, *Williams* v. *Oklahoma,* 358 U.S. 576, 585.

On the other hand, the petitioner could at the outset of the trial decide to take the stand, so that, in the event of a guilty verdict, his jury could impose sentence based on some quantum of information. But petitioner could thus purchase a rational sentence only by surrender of his privilege against self-incrimination. The surrender could be costly: the prosecution would be permitted to counter with otherwise inadmissible evidence, *e.g.,* evidence of bad character, including unrelated crimes, Section 921.13, Florida Statutes; *Williams* v. *State;* 110 So.2d 654, 661 (1959); *Davis* v. *State,* 123 So.2d 703 (1960). Even were a jury given cautionary instructions that such evidence should be considered on the issue of sentence alone, the determination of guilt would inevitably be prejudiced. As Judge Learned Hand remarked, such cautionary instructions are only "the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else." See *Nash* v. *United States,* 54 F.2d 1006, 1007 (2d Cir. 1932), cert. denied, 285 U.S. 556.

In sum, the Florida single-verdict procedure here employed requires a defendant to choose between a procedure that threatens a fair trial on the issue of guilt and one that detracts from a rational determination of the sentence. See, A.L.I., Model Penal Code, Tent. Draft No. 9 (May 8, 1959), Comment to §201.6, at 74-76.

Other procedures employed by Florida in rape prosecutions exacerbate, rather than mitigate, the harshness of the choice which a defendant is required to make. The jury

is given no instruction by the court on the manner in which it should proceed in imposing sentence; it is left completely without guidance. The juror's oath offers no help: on the subject of sentence, it is silent.[12] Thus deterred by neither instruction nor oath, the jury is free to vote its prejudices. (The comparative record of death sentences imposed on Negro and white defendants in rape cases suggests that Florida juries make full use of this freedom.) Moreover, if the jury is unable to decide by majority vote whether a defendant shall live or die, the statute requires that he die—only the vote of a "majority" for mercy permits the court to impose a jail sentence rather than death. Finally, the sentence resulting from these procedures may not be reviewed or modified on appeal; as long as it is within the statute, review of the sentence is outside the jurisdiction of any appellate court, *Davis* v. *State,* 123 So.2d 703 (1960).

Florida's simultaneous submission of guilt and sentence to a jury is much akin to New York's former practice of simultaneously submitting to a jury the two issues of the voluntary nature of a confession and the guilt of the accused. The former New York practice was, of course, struck down by this Court in *Jackson* v. *Denno,* 378 U.S. 368, where the Court recognized the prejudice inevitable when guilt and another issue are determined simultaneously:

> . . . an accused may well be deterred from testifying on the voluntariness issue when the jury is present because of his vulnerability to impeachment by proof of prior convictions and broad cross-examination. . . .

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[12] The oath administered to jurors in Florida reads, Section 913.11, Florida Statutes Annotated:

> "You do solemnly swear (or affirm) that you will well and truly try the issues between the State of Florida and the defendant whom you shall have in charge and a true verdict render according to the law and evidence, so help you God."

> Where this occurs the determination of voluntariness is made upon less than all of the relevant evidence. (378 U.S. 368, 389, n. 16.)

And see also, *Whitus* v. *Balkcom,* 333 F.2d 496 (5th Cir. 1964), holding that a Negro defendant may not constitutionally be required to choose between trial to a jury from which Negroes are excluded and trial to a jury prejudiced by defendant's demand for Negro participation.

The single-verdict procedure not only thrusts upon the defendant an intolerable choice between unfairnesses, but it operates also to insure that, if found guilty, he will be sentenced upon less than all pertinent information. For as this Court recognized in *Williams* v. *New York,* 337 U.S. 241, 247-8, the exclusionary rules customary and appropriate to trial of the issue of guilt will bar receipt of much evidence properly to be considered on sentence.

As pointed out in the dissent below, a simple alternative to the single-verdict procedure is available under the Florida statutes: the issue of innocence or guilt could be tried first, with all appropriate evidentiary safeguards observed. Should the jury return a guilty verdict, it could then hear all material pertinent to sentence, and then render a just, informed determination.

For Florida to insist upon the single verdict under these circumstances constitutes, petitioner submits, a denial to petitioner of due process of law.

The procedure employed by Florida is used by many states, and 18 U.S.C. §2113(e) permits federal juries to impose the death penalty.[13] The question of whether this

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[13] 18 U.S.C. §2113(e): "Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to

procedure violates the requirements of due process of law has been raised often in the Third and Second Circuits and in the District of Columbia Circuit. See, *United States ex rel. Rucker* v. *Myers,* 311 F.2d 311 (3rd Cir. 1962), cert. denied, 374 U.S. 844; *United States ex rel. Scoleri* v. *Bonmiller,* 310 F.2d 720 (3rd Cir. 1962), cert. denied, 374 U.S. 828; *United States* v. *Curry,* —— F.2d —— (2nd Cir. No. 29000, Dec. 22, 1965); *Frady* v. *United States,* 348 F.2d 84 (D.C. Cir. 1965). Although the procedure has been upheld, its validity was seriously questioned in *Frady* and *Curry, supra,* and one justice of the Supreme Court of Florida urged in the present case that it violates constitutional standards; in all instances the case of *Jackson* v. *Denno, supra,* was cited.

Therefore, the issue of due process here presented is of general importance and interest and warrants the grant of certiorari. Moreover, in the present case the vice of the procedure is demonstrated in its starkest form. Florida allows the jury, unguided by any standards or instructions and exercising a discretion not reviewable by any court, to send a defendant to his death; it permits the jury to exercise freely the prejudices called up by the race of the defendant and the victim; and it does not even give the defendant an opportunity freely to present evidence to mitigate the penalty.

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free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or punished by death if the verdict of the jury shall so direct."

However, federal courts have pointed out that having the jury decide the sentence after rendering the verdict is fully consistent with §2113(e) and is more compatible with Rule 32(a) of the Federal Rules of Criminal Procedure. ("Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.") *United States* v. *Curry* (2nd Cir. No. 29000, Dec. 22, 1965, Slip Opinion at 3560).

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

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Opinion of the Supreme Court of Florida

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1965

CASE No. 34,101

WILLIAM BENJAMIN CRAIG,

Appellant,

—VS.—

STATE OF FLORIDA,

Appellee.

Opinion filed October 13, 1965

An Appeal from the Circuit Court for Leon County, Ben C. Willis, Judge.

Howard W. Dixon, Tobias Simon, Maurice Rosen, Jack Greenberg and Leroy D. Clark, for Appellant.

Earl Faircloth, Attorney General, and George R. Georgieff, Assistant Attorney General, for Appellee.

PER CURIAM.

The appellant Craig was convicted of the crime of rape and sentenced to pay the supreme penalty. The conviction was affirmed on direct appeal. Craig v. State, 168 So. 2d 747.

Craig filed in the trial court a "Motion for reduction of sentence from death to life." Allegedly, he moved under Section 921.24, Florida Statutes, which authorizes the cor-

rection of an illegal sentence in a criminal case. By his motion, the appellant contended that:

(a) Sec. 794.01, Fla. Stat. which imposes the death sentence for the crime of rape, is violative of the constitutional prohibition of cruel and unusual punishment prescribed by the Eighth Amendment, Constitution of the United States.

(b) Sec. 794.01, supra, is patently unconstitutional because it requires the trial jury simultaneously to determine both guilt or innocence and the penalty.

(c) Sec. 794.01 is unconstitutional as applied to appellant. It is alleged that statistics reveal a pattern of discrimination against negroes in the imposition of the death sentence. Craig is a negro.

The Circuit Judge denied the Motion and expressly upheld the validity of Section 794.01, supra, against all attacks leveled at it. Craig appeals.

We have considered the Motion as a collateral, post conviction assault on a judgment of conviction within the scope of our Criminal Procedure Rule No. 1. Regardless of the title of the document, its purpose is to attack the judgment on constitutional grounds. We, therefore, treat appellant's Motion as if it were filed under Rule 1, supra.

We take jurisdiction because the trial judge passed directly on the validity of Section 794.01, supra. Article V, Section 4(2), Florida Constitution. We do not construe the instant judgment as one imposing the death penalty. That was done by the original judgment of conviction which was assaulted by the post conviction Motion. The judgment here was final because the Circuit Judge had

fully completed his judicial labor. We regard it as appealable just as any other Rule 1 order is appealable. We have held that such orders will be reviewed by this Court, or an appropriate District Court, depending upon the content of the order. Roy v. Wainwright, 151 So. 2d 825. Where, as here, such an order passes directly on the validity of a state statute it comes directly to the Supreme Court from the trial court. We have said that the procedure is the same as in habeas corpus. Mitchell v. Wainwright, 155 So. 2d 868. When the order does not bring the case within our appellate jurisdiction, it should go to the proper District Court.

On the merits we find that the Circuit Judge ruled correctly in sustaining the validity of the statute against the attack made upon it.

The judgment is affirmed.

THORNAL, *C.J.*, ROBERTS, DREW, O'CONNELL and CALDWELL, *JJ.*, concur.

THOMAS, *J.*, dissents.

ERVIN, *J.*, dissents with opinion.

ERVIN, *J.*, dissenting.

Appellant was convicted in the Circuit Court of Leon County, Florida, of rape of a female over the age of ten years and sentenced to death pursuant to §794.01, F.S., such sentence being mandatory there being no recommendation of mercy by the jury.

He appealed his conviction to this Court and the judgment of conviction was affirmed. See Craig v. State, 168 So.2d 747.

Opinion of the Supreme Court of Florida

This is a second appeal to this Court. In this appeal it appears the Appellant, as defendant, filed motion for reduction of sentence from death to life imprisonment or less with the Circuit Court of Leon County, pursuant to §921.24, F.S., which provides a trial court at any time may correct an illegal sentence. The motion was denied by the Circuit Court. In its denial the Circuit Court upheld the constitutionality of §794.01, F.S. It follows our jurisdiction is properly invoked by the Appeal under Section 4(2), Article V, State Constitution.

Appellant, a member of the Negro race, urges reversal and assigns four reasons as follows:

No. 1. Imposition of the death penalty on Craig pursuant to Florida's practice of racial discrimination in capital punishment for rape denies him the equal protection of the laws guaranteed by the Fourteenth Amendment.

No. 2. Florida's grant to juries and the Pardon Board of unlimited, undirected and unreviewable discretion in the imposition of the death penalty for rape violates the due process clause of the Fourteenth Amendment.

No. 3. Florida's single verdict procedure allowing the jury which determines guilt to fix capital punishment for rape violates the due process clause of the Fourteenth Amendment.

No. 4. Florida's imposition of the death sentence for rape where no life was taken and without consideration of the aggravating or mitigating circumstances of the particular offense subjects Appellant to cruel and unusual punishment in violation of the Eighth Amendment as incorporated in the Fourteenth Amendment.

By motion supported by affidavit, Appellant brought to the attention of the trial court the following statistical data which was not contradicted by the State:

"6. In the 25-year period between January 1, 1940, and December 31, 1964, inclusive of the case at bar, 285 persons have been convicted of the crime of rape in the State of Florida. Of these, 152 have been Negroes, 132 have been White, and one was an Indian. Nevertheless, only 6 Whites and 48 Negroes have been sentenced to death; of these, only 1 White man has died, while 29 Negroes have been electrocuted and 12 more await execution in Death Row at Florida State Penitentiary at Raiford. . . ."

Based on this data, Appellant contends under Reason No. 1 that §794.01, F.S., which reads as follows:

"Rape and forcible carnal knowledge; penalty.—Whoever ravishes and carnally knows a female of the age of ten years or more, by force and against her will, or unlawfully or carnally knows and abuses a female child under the age of ten years, shall be punished by death, unless a majority of the jury in their verdict recommend mercy, in which event punishment shall be by imprisonment in the state prison for life, or for any term of years within the discretion of the judge. It shall not be necessary to prove the actual emission of seed, but the crime shall be deemed complete upon proof of penetration only.",

is unconstitutional because juries in the State of Florida have systematically applied this statute mainly against members of the Negro race. He argues the statute violates the equal protection clause of the Federal Constitution because the history and statistics of its application by juries in the state disclose the infliction of death sentences in rape cases has been much greater upon Negroes

than upon white persons. He cites in support of this contention Brown v. Board of Education, 347 U.S. 483 (1954); Watson v. City of Memphis, 373 U.S. 526 (1963); Yick Wo v. Hopkins, 118 U.S. 356 (1886); Tigner v. Texas, 310 U.S. 141 (1940); Fowler v. Rhode Island, 345 U.S. 67 (1953); Hamilton v. Alabama, 376 U.S. 650 (1964); Oyler v. Boles, 368 U.S. 448 (1962); Snowden v. Hughes, 321 U.S. 1 (1944); Arnold v. North Carolina, 376 U.S. 773 (1964); People v. Harris, 182 Cal.App.2d Supp. 837, 5 Cal. Reptr. 852; Shelley v. Kraemer, 334 U.S. 1 (1948); Lombard v. Louisiana, 373 U.S. 267 (1963); Strauder v. West Virginia, 100 U.S. 303 (1880); Eubanks v. Louisiana, 356 U.S. 584 (1958); Hernandez v. Texas, 347 U.S. 475 (1954); McLaughlin v. Florida, 84 S.Ct. 1693 (1964); Swain v. Alabama, 33 U.S. L. Week 4231 (1965); Omaya v. California, 332 U.S. 633 (1948); Gomillion v. Lightfoot, 364 U.S. 339 (1960).

In support of reason No. 2, Appellant contends that the authority given to juries to make recommendations of mercy as to death sentences for rape, amounts to an unlimited, undirected and unreviewable discretion violation of due process of law. The Appellant contends no standards are prescribed for the exercise of this authority and that the same is exercised arbitrarily and irrationally by juries. He cites in support Herndon v. Lowry, 301 U.S. 242, 263 (1937); Smith v. Cahoon, 283 U.S. 553 (1931); Lovell v. Griffin, 303 U.S. 444 (1938); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 505 (1952).

As to reason No. 3, Appellant contends the single verdict phase procedure now followed in our state authorizing juries which determine guilt simultaneously to fix capital punishment for rape violates due process of law in that this procedure tends to deny a defendant a fair trial. Appellant calls attention that pursuant to Florida procedure

a jury ordinarily makes its life-death choice simply on the evidence presented on the issue of guilt, while modern concepts individualizing punishment have made it all the more essential that a sentencing judge or jury not be denied a separate opportunity to receive pertinent information, including reports from probation and parole authorities relative the degree of punishment, unrestrained by rigid adherence to restrictive rules of evidence properly applicable to the trial of the issue of guilt; and that it is an imperative condition of rational sentencing choice that the sentencer consider more information about the individual defendant than is likely to be forthcoming on the trial of the guilt issue. In Davis v. State (Fla.), 123 So.2d 703, in headnotes 9-11 this Court apparently agrees to the modern concept of individualized punishment.

Appellant also points out that if a defendant seeks to present to the jury pertinent background evidence to inform its sentencing choice, Florida procedure permits the prosecution to counter with evidence of defendant's bad character, including evidence of unrelated crimes, citing §921.13, F.S.; Williams v. State, 110 So.2d 654, 661 (Fla. 1959); Davis v. State, 123 So.2d 703 (Fla. 1960); Whitney v. Cochran, 152 So.2d 727 (Fla. 1963); Nations v. State, 145 So.2d 259 (DCA2nd 1962). Appellant contends that the possibility that background information may be strongly prejudicial as to issue of his guilt forces a defendant to a "choice between a method which threatens the fairness of the trial of guilt or innocence and one which detracts from the rationality of the determination of the sentence."

Appellant contends the two stage procedure now employed in a number of states and in military courts martial

should be judicially adopted in Florida to insure due process and avoid effects prejudicial to a fair trial.

Appellant refers to the fact that a defendant usually has the right of allocution; that is, the right to express without restraint to his sentencer why judgment or sentence should not be meted out to him but he contends this right under present Florida procedure in rape cases is not freely given to him without possible jeopardy, to be heard by the jury on the question of punishment. Appellant also points out that under existing procedure if the defendant in a rape case takes the stand he is subject to incriminating cross examination even though he limits his statement to the issue of a mercy recommendation.

Concerning reason No. 4 Appellant contends that a death sentence in a rape case without due consideration of aggravating or mitigating circumstances subjects a defendant to cruel and unusual punishment, and such a sentence is inherently cruel and unusual under modern concepts, citing dissenting opinion in Rudolph v. Alabama, 84 S.Ct. 155 (1963); he also cites Weems v. United States, 217 U.S. 349 (1910), and Trop v. Dulles, 356 U.S. 86 (1958). In this portion of his argument Appellant recurs to the statistical disproportion of death sentences meted Negro males compared to those imposed upon white males in rape cases, contending this disparity amounts to cruel and unusual punishment for one class of citizens not visited upon other citizens.

The constitutionality vel non of §794.01, F.S., is sustained by the overwhelming weight of authority.

Sentence within statutory limits, no matter how harsh and severe, is not cruel and unusual punishment within the constitutional provision; 9 Fla. Jur., Criminal Law,

§269, p. 302, citing Brown v. State (1943), 152 Fla. 853, 23 So.2d 458.

"Punishment of death is not in violation of the constitutional prohibition of cruel and unusual punishment unless it is so inflicted that it involves lingering death, torture, or such practices as disgraced the civilization of former ages." 9 Fla. Jur., Criminal Law, §271, p. 304. See also, 30 A.L.R. 1452; Ferguson v. State (1925), 90 Fla. 105, 105 So. 840, cert. denied 273 U.S. 663, 71 L.Ed. 828, 47 S.Ct. 454.

> "The punishment for both forcible and statutory rape is death, unless a majority of the jury in their verdict recommend mercy, in which event the punishment is imprisonment for life, or for any term of years within the discretion of the judge. The controlling statute is not unconstitutional on its face as being violative of defendant's rights under the Fourteenth Amendment to the Constitution of the United States." 27 Fla. Jur. 581, Rape and Related Offenses, §47.

The power to define what acts shall constitute criminal offenses and what penalties shall be inflicted on offenders is legislative and not judicial. 14 Am. Jur. 766, 767; 15 Am. Jur., paragraphs 507 to 510, inclusive.

The wisdom or policy of §794.01, F.S., lies within the province of the Legislature and beyond the concern of the judiciary. Furthermore, it is our traditional duty to uphold the constitutionality of the statute if it is at all possible to do so and resolve all doubts in its favor.

Although a statute may be constitutional upon its face, in a proper case an unconstitutional application of it will be stricken. Ex parte Wise, 141 Fla. 222, 192 So. 872

(1940), and Sutton Phosphate Co. v. Priest (1914), 67 Fla. 370, 65 So. 282.

It is my view that §794.01, F.S., has been unconstitutionally applied to the extent hereinafter indicated. I agree with Appellant a two-stage procedure is necessary to give the statute constitutional operation. See Jackson v. Denno, 378 U. S. 368 (1964).

There should be a separation of the jury's determination of the issue of guilt of the defendant and the issue concerning the recommendation of mercy in a rape case if a defendant demands it prior to the time the jury retires to determine the issue of guilt or if the trial court on its own motion directs such separation. If the defendant is found guilty of rape, then should follow the determination of whether capital punishment is to be imposed and the jury should decide the issue of whether a recommendation of mercy is to be made by a separate consideration. See: U. S. ex rel. Scloeri v. Bonmiller, 310 F. 2d 720, and U. S. ex rel. Bukery v. Rundle, 200 F. Supp. 557.

It does not require new legislation to inaugurate the two-stage procedure. Section 794.01, F.S., should be read in connection with §919.23, F.S., relating to verdicts generally in criminal cases. Section 919.23 reads:

> "(1) In all criminal trials, the jury, *in addition to a verdict of guilty of any offense, may recommend the accused to the mercy of the court* or to executive clemency, and *such recommendation* shall not *qualify the verdict* except in capital cases. In all cases the court shall award the sentence and shall fix the punishment or penalty prescribed by law.
>
> "(2) Whoever is convicted of a capital offense and recommended to the mercy of the court by a majority

> of the jury *in their verdict,* shall be sentenced to imprisonment for life; or if found by the judge of the court, where there is no jury, to be entitled to a recommendation to mercy, shall be sentenced to imprisonment for life, at the discretion of the court." (Emphasis supplied.)

I do not consider the language, "in their verdict," appearing in §§794.01, F.S., or in §919.23(2), F.S., is an absolute bar to a separate consideration by the jury of the issue of a mercy recommendation. The statutes require a unanimous vote for a guilty verdict in a rape case, but only a majority vote for a mercy recommendation. This indicates the law provides for separate consideration of the two issues. The two statutes read together do not preclude the jury from considering separately the issues of guilt and mercy recommendation and inserting its two findings "in their verdict." Under the two-stage procedure, after the trial of the issue of guilt, the jury would retire, make its finding, and then report to the court its first phase of its verdict that it had found the defendant guilty of rape. Thereupon it would hear the matter of the mercy recommendation, retire, make its finding thereon, and add to the verdict of guilty its finding upon the issue of the recommendation. This procedure is simple and uncomplicated.

Because of the gravity of rape cases no strained construction should be given the two statutes relating to verdicts in such cases which would technically deny a full, fair and separate hearing of these two important issues by the jury. The two issues are separate and distinct and require different quantum of jury notes. The division of the two issues at the trial is a matter of procedure, within the

province of the judiciary to prescribe inasmuch as the Legislature in the two statutes has not conclusively prohibited separate consideration of them by the jury. Section 3 of Article V, State Constitution, authorizes the Supreme Court to promulgate the rules of practice and procedure in all courts. I think it lies within the power of this Court to prescribe the practice and procedure to be followed in rape trials. Bluesten v. Florida Real Estate Commission, 125 So. 2d 567 (Fla. 1961); Jaworski v. City of Opa-Locka, 149 So. 2d 33 (Fla. 1963); State v. Robinson, 132 So. 2d 156 (Fla. 1961); and City of Miami v. Murphy, 137 So. 2d 825 (Fla.).

But aside from the procedural aspects of this case, it is fundamentally necessary in order to insure a defendant due process and to guarantee him a fair trial of the two issues, guilt and recommendation of mercy, that there be separate consideration thereof by the jury.

The reasons assigned by Appellant and hereinbefore outlined appear to me to support the proposition that it is fundamentally essential to have a separate jury determination of the two issues in a rape trial.

In 15 Am. Jur., Criminal Law, §519, the text on page 167 reads in part:

> "§519 Hearing Evidence to Determine.—The rule is well settled that where the court must determine the punishment to be imposed, either on the finding of the jury or on a plea of guilty, it is correct practice to hear evidence, by affidavit or otherwise, in aggravation or mitigation of punishment. . . ."

In 15 Am. Jur., Criminal Law, §457, the text on page 114 reads in part:

> "§457. Allocution.—While there are a few decisions which take the view that failure to ask a prisoner if he has any reason to give why sentence should not be passed is not reversible error even in capital cases, unless it is apparent that the prisoner was or may have been injured by the omission, numerous decisions follow the common-law rule and hold that asking the defendant before sentence in capital cases if he has anything to say why sentence of death should not be pronounced against him is *indispensably necessary*. . . ." (Emphasis supplied)

See, also, United States v. Behrens, 375 U.S. 162, 11 L.Ed. 2d 224, 84 S.Ct. 295 (5th headnote). Under our procedure in rape cases where a death sentence is mandatory if there is no recommendation of mercy by the jury, the allocutionary showing of the defendant must be to the jury if it is to have any value to the defendant.

In trying the issue of a mercy recommendation, latitude should be accorded the defendant to bring to the jury's attention whatever evidence, information or other showing he reasonably believes is necessary to show why the death penalty should not be inflicted upon him inasmuch as this phase of the matter is allocutionary but with right on behalf of the state to cross examine and to give countervailing evidence, data and arguments to counteract the showing made by the defendant. The hearing on the issue would be similar in many respects to a state pardon board hearing on the issue of commutation or clemency where the strict rules of trial procedure are not followed. See

article in Florida Bar Journal, Mar., 1964, entitled "Military Law," by Capt. Rex H. Conrad, p. 138, as to court martial procedure.

Inasmuch as the appellant did not have a jury's determination of the issue of a recommendation of mercy separate and distinct from his trial on the issue of guilt because our existing procedure did not permit him a two-stage jury consideration— and the thrust of his appeal is that he has been prejudiced as a result—I believe the sentence below should be vacated with direction that the trial court empanel a jury to consider as a distinct phase the question of whether or not a recommendation of mercy should be made in favor of the defendant.

I believe also that a trial judge has the power and duty to direct a new trial on the issue of a mercy recommendation for a defendant pursuant to Ch. 920, F.S., if he finds error was committed in the jury's trial of the issue concerning a recommendation of mercy in a rape case.

In addition, I would hold that an appeal should be allowed a defendant from a jury's refusal to recommend mercy in a rape case; that because of the requirements of due process (including the necessity of avoiding arbitrariness, unequal application and abuse of discretion) the appellate court should exercise the duty to review the finding of the jury on the issue of a mercy recommendation pursuant to §59.34, F.S., which reads as follows:

> "Judgment; duty of appellate court in its determination of causes.—The court, on an appeal, shall examine the record, and reverse or affirm the judgment, *sentence* or decree of the court below; *give* such judgment, *sentence,* or decree *as the court below should have given; or otherwise as to it may appear according to law.*" (Emphasis supplied.)

Thereunder it would be the duty of the appellate court to give such sentence as to it would seem warranted under the evidence and data submitted to meet the ends of justice if it appeared the jury had abused its discretion or otherwise improperly or erroneously refused to recommend mercy.

Under the foregoing suggested judicial safeguards and procedures, I believe the constitutionality of §794.01, F.S., in respect to its operation can be sustained as against the several attacks made upon it by Appellant. The unreviewability of a non-recommendation of mercy in a guilty verdict mandatorily requiring a death penalty admittedly gives me concern. Abuse of discretion by the jury, its bias and prejudice—if any—undue restraints upon the admission of evidence and of information in the allocutionary showing of a defendant before the jury as to why the death penalty should not be imposed upon him, or other harmful unfairness or unreasonableness amounting to a denial of due process of law in a jury's determination whether the death penalty should be imposed in a rape case, all should be reviewable by the trial judge and appellate courts. Procedures and judicial review as indicated would go far to remove the constitutional objections raised by Appellant to the existing application of the statute. Ordinarily so broad an application of §59.34, F.S., is not permissible because the discretionary fixing of punishment within legislative limits at the trial level is not subject to appellate modification. See Davis v. State (Fla.), 123 So. 2d 703, first headnote. But in this instance we are considering the effect of a jury's determination affecting the extent of punishment to be imposed in a rape case which may, and often does include the mandatory death penalty. Under these circumstances and in view of the nature of the attack

upon the statute, I conclude due process requires that a jury's determination not to recommend mercy, resulting in capital punishment, should be judicially reviewed and in such review the full and literal extent of the language of §59.34, F.S., should be given unrestricted application.

It is interesting to note that in certain jurisdictions statutes similar to §59.34, F.S., have been held to authorize appellate courts to exercise discretion in changing punishments meted out by lower tribunals. See 5 Am. Jur. 2d, Appeal and Error, §§937 and 938. Also, Mitthauer v. Patterson, 8 NY 2d 37, 201 NYS 2d 321, 167 N.E. 2d 731 (1960). See Nowling v. State, 151 Fla. 584, 10 So. 2d 130.

For the reasons set forth I believe the death sentence in the judgment of conviction below should be vacated with directions that the Circuit Court empanel a jury to retry the issue of a mercy recommendation only. If no recommendation of mercy is made, then the death sentence should be reinstated.

The procedure suggested is in accord with Appellant's motion in the trial court to reduce his death sentence pursuant to §921.24, F.S., and appears to me to be the only legal method by which there might possibly be any reduction of his sentence under the particular circumstances and law of this case.